U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 30 2006

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. According to Part 6 of the petition, the petitioner seeks employment as a "medical scientist." We acknowledge that the petitioner was working as a research associate as of the date of filing. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the petitioner has not overcome the director's concerns. Specifically, we concur with the director that the petitioner's accomplishments as of the date of filing the petition did not justify a waiver of the job offer and find counsel's assertion that the petitioner need only be eligible for the classification but not the waiver of the job offer as of the date of filing unpersuasive.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Pharmacology from the Shanghai Institute of Materia Medica. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is

whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, neurology, and that the proposed benefits of his work, improved understanding and treatment of Parkinson's Disease, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

In response to the director's request for additional evidence, counsel asserts that this final factor "is exactly the opposite requirement contained in the statute." Specifically, counsel quotes the following language from *Matter of New York State Dep't of Transp.* 22 I&N Dec. at 218:

> Because, by statute, "exceptional ability" is not by itself sufficient cause for a national interest waiver, *the benefit* which the alien presents to his or her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F).

(Our emphasis.) Counsel notes, correctly, that an alien seeking eligibility as an alien of exceptional ability, need not meet the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F) provided the alien meets at least three of the other criteria. We do not follow, however, how that fact impacts the legal soundness of *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215. That decision does not provide that the national interest waiver is contingent on meeting and exceeding the *requirements* of 8 C.F.R. § 204.5(k)(3)(ii)(F). Rather, the decision explains that merely meeting that criterion is insufficient. As the exceptional ability classification normally requires an alien employment certification, the reasoning set forth in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218 is sound. Moreover, counsel quotes the above language out of context. The above language must be considered in light of the sentence that follows:

> Because the statute and regulations contain no provision allowing a lower national interest threshold for advanced degree professionals than for aliens of exceptional ability, this standard must apply whether the alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree.

Id. at 218-219.

Regardless, *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215 is a precedent decision, binding on all officers of Citizenship and Immigration Services (CIS). 8 C.F.R. § 103.3(c). To date, neither Congress[1] nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. In fact, one federal court has upheld the decision, stating that it "provides a reasonable and predictable interpretation" of the statute. *Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001).

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important

[1] Congress has recently amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 215; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

Prior to studying for his Ph.D. at the Shanghai Institute of Materia Medica the petitioner was a lecturer and researcher at Xuzhou Medical College. After obtaining his Ph.D. in 1999, the petitioner began working as a postdoctoral research associate for the University of Pittsburgh. In August 2002, the petitioner started his current position as a research associate at the University of Chicago. The petitioner filed this petition on September 11, 2003.

On appeal, counsel asserts that the director ignored the reference letters. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of industry interest and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

None of the petitioner's references address the significance of his research in China. One of the petitioner's Chinese papers won a First Place prize in the [redacted] Natural Science Excellent

Scientific Papers 1994-1995 competition. In 1996, the petitioner's acupuncture project received a first place prize from the Jiangsu Provincial Bureau of Chinese Medicine Administration. In the same year, the petitioner also received recognition from the Xuzhou Medical College. In 1998, the petitioner's paper received a National Excellent Paper Prize at that 8th National Neuro-pharmacology Seminar by the China Pharmaceutical Society.

The director concluded that the above honors were student awards. On appeal, counsel notes that most of the honors are in recognition of the petitioner's research before beginning his Ph.D. studies. Counsel further asserts that while the 1998 Excellent Paper Prize recognized the petitioner's Ph.D. research, it is a national award. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The record lacks evidence regarding the significance of the above honors, such as the number of prizes in each grade and the pool of candidates for each honor. Moreover, recognition from peers and government entities is one of the regulatory criteria for aliens of exceptional ability, a classification that normally requires an alien employment certification. We cannot conclude that meeting one, two (the petitioner is also a member of a professional association) or even the requisite three criteria for that classification, warrants a waiver of the alien employment certification. Finally, the petitioner has not adequately related his work in China to his proposed work that he claims is in the national interest, Parkinson's research.

Dr. [redacted] the petitioner's supervisor at the University of Pittsburgh, discusses the importance of Parkinson's research, an issue not contested by the director. He asserts that the petitioner "successfully established an *in vitro* Parkinson's disease cellular model which has proved extremely useful to other researchers in this field." Dr. [redacted] further states, however, that the petitioner's results based on this model were only just being submitted for publication in peer-reviewed journals. Dr. [redacted] does not explain how other research groups could have learned of the petitioner's work prior to publication.

At the University of Chicago, the petitioner joined the laboratory of Dr. [redacted] Dr. [redacted] explains that the petitioner previously developed the oxidative cellular model, which he used to make the "remarkable (and counterintuitive) discovery that dopaminergic neurons in the primary neuronal culture are more susceptible to the ill effects of 6-hydroxydopamine, on of the Parkinson's disease specific neurotoxin, than nondopaminergic neurons." The petitioner also discovered "that a unique molecule is involved in the development of this specific neurotoxin-induced cellular Parkinson's disease." According to Dr. [redacted] this research provides a more "fundamental approach to how the disease develops."

In the laboratory of Dr. [redacted] the petitioner is focusing on determining the optimal anatomical target sites for L-DOPA gene therapy, evaluating the optimal timing of L-DOPA gene therapy and studying the mechanism by which dyskinesia (the lack of coordination induced by L-DOPA treatment) develops. Dr. [redacted] asserts that the petitioner has made "remarkable contributions" while at the University of Chicago, but the only example is that the petitioner "found some crucial phenomenon after the

treatment of Parkinson's disease animals with L-DOPA, which are very relevant to the clinical Parkinson's disease." Dr. [redacted] asserts that the petitioner's impact in the field is apparent from the citations to his work. Other references make the same assertion. The only evidence of citation submitted initially, however, reflects that two independent research teams had cited the petitioner's work while the petitioner himself also cited his own work.

Dr. [redacted], a professor at the University of Texas at Austin, indicates his familiarity with the petitioner's "mentor." While Dr. [redacted] praises the petitioner's experience and abilities and the importance of the petitioner's *area* of work, he concludes only that the petitioner's results are likely to impact the field. While Dr. [redacted] asserts that the petitioner has "helped to move the field forward," most research, in order to receive funding and to be published, must present some benefit to the general pool of scientific knowledge.

Dr. [redacted], a professor at the University of Florida Brain Institute, praises the petitioner's ability to intuit and his laboratory skills. Dr. [redacted] speculates that the petitioner's research "will undoubtedly be particularly helpful in designing new therapeutic strategies to biochemically -- and perhaps even genetically -- treat damaged nervous systems." While Dr. [redacted] asserts that the petitioner's research "is of aid to me as we, in my laboratory, explore the same phenomena in different contexts," he does not specifically explain how he is using the petitioner's work. For example, Dr. [redacted] does not claim to have adopted the petitioner's oxidative cellular model.

Dr. [redacted], director of the Molecular Neurobiology Laboratory at Harvard Medical School, explains that he collaborates with Dr. [redacted] and learned of the petitioner's work through that connection. Dr. [redacted] provides no examples of how the petitioner's work has already impacted the field and does not claim to have adopted the petitioner's oxidative cellular model.

Finally, [redacted], a professor at the University of Auckland, discusses the potential of the petitioner's research. He states that he anticipates the "perfection" of the petitioner's "experimental technique so that it may be applied to other similar research in our field." This statement implies that, as of the date of Dr. [redacted] letter, other laboratories had yet to apply the petitioner's model.

The petitioner initially submitted copies of 14 published articles. The petitioner also initially submitted evidence that three of these publications had each been cited once. One of the citations, as stated above, is a self-citation by the petitioner.

In response to the director's request for additional evidence, the petitioner submitted a new letter from Dr. [redacted] praising the work published in a 2004 article in the *Journal of Neurochemistry*. This article was published after the date of filing. The petitioner also submitted other articles published after the date of filing. The petitioner also submitted five articles that cite his work, three of which were published after the date of filing. In addition, two of the citations that postdate the filing of the petition are by the petitioner's coauthors.

The director concluded that the petitioner's work had not been heavily cited and that the petitioner had not established that he "otherwise stands out from others in his specialty in terms of his influence on others." On appeal, counsel challenges the exclusion of achievements after the date of filing. Counsel attempts to distinguish *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971), because in that matter the issue was eligibility for the classification sought, not an added benefit such as a waiver of the alien employment certification requirement. Counsel notes that the petitioner in this matter was an advanced degree professional as of the date of filing. Counsel asserts that precedent decisions relating to regulatory determinations should not be extended to a "multivariate analysis which the legacy agency concluded simply cannot be reduced to regulatory criteria." Counsel concludes, "it seems clear that the non-statutory and non-regulatory indicia of influence should be reviewed by the CIS at each stage of the decision-making process based on the most up-to-date data to ensure that the best decision possible is made and that the decision-maker's discretion is fully informed."

Counsel is not persuasive. *Matter of Katigbak,* 14 I&N Dec. at 49 predates the statutory provisions permitting a waiver of the alien employment certification process. Significantly, that decision has now been incorporated into CIS regulations, 8 C.F.R. § 103.2(b)(12), which requires that evidence submitted in response to a request for evidence establish "filing eligibility at the time the application or petition was filed." Moreover, we find that the reasoning behind *Matter of Katigbak,* 14 I&N Dec. at 49 is more widely applicable. That decision provides:

> If the petition is approved, he has established a priority date for visa number assignment as of the date that petition was filed. A petition may not be approved for a profession for which the beneficiary is not qualified at the time of its filing. The beneficiary cannot expect to qualify subsequently by taking additional courses and then still claim a priority date as of the date the petition was filed, a date on which he was not qualified.
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> Section 204 of the Act requires the filing of a visa petition for classification under section 203(a)(3). The latter section states, in pertinent part: "Visas shall next be made available to *qualified immigrants* who *are members* of the professions." (Emphasis added.) It is clear that it was the intent of Congress that an alien be a recognized and fully qualified member of the professions at the time the petition is filed. Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts. To do otherwise would make a farce of the preference system and priorities set up by statute and regulation.

Id. The Regional Commissioner continued this reasoning in *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg. Comm. 1977). That decision reemphasizes the importance of not obtaining a priority date prior to being eligible based on future experience. In fact, despite counsel's assertion to the contrary, this principle has been extended beyond the alien's eligibility for the classification sought.

For example, an employer must establish its ability to pay the proffered wage as of the date of filing. *Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Act. Reg. Comm. 1977). That decision provides that a petition should not become approvable under a new set of facts. Recognizing that *Matter of Katigbak,* 14 I&N Dec. at 49 was not "foursquare with the instant case" in that it dealt with the beneficiary's eligibility, *Matter of Great Wall,* 16 I&N Dec. at 145 still applies the reasoning. The decision provides:

> In sixth-preference visa petition proceedings the Service must consider the merits of the petitioner's job offer, so that a determination can be made whether the job offer is realistic and whether the wage offer can be met, as well as determine whether the alien meets the minimum requirements to perform the offered job satisfactorily. It follows that such consideration by the Service would necessarily be focused on the circumstances at the *time of filing* of the petition. The petitioner in the instant case cannot expect to establish a priority date for visa issuance for the beneficiary when at the time of making the job offer and the filing of the petition with this Service he could not, in all reality, pay the salary as stated in the job offer.

Id. (Emphasis in original.) Finally, when evaluating revisions to a partnership agreement submitted in support of a petition seeking classification as an alien entrepreneur pursuant to section 203(b)(5) of the Act, this office relied on *Matter of Katigbak,* 14 I&N Dec. at 49 for the proposition that "a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts." *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm. 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

While citations published after the date of filing may serve as evidence of the continued relevance of an alien's work that had already been well cited as of the filing date, they cannot be considered evidence that the alien was already influential as of that date. Moreover, articles by the alien that were not published as of the date of filing and, thus, had not been subject to peer review and disseminated in the field as of that date, cannot establish eligibility for the waiver as of the date of filing. To hold otherwise would have the untenable result of an alien securing a priority date based on the speculation that his work might prove influential while the petition is pending.

In addition to asserting that the post filing citations are relevant, counsel asserts that a petition should not be denied solely because the alien provides no evidence of citations. Counsel asserts that this office has "consistently" found that citations are not dispositive. The examples provided by counsel are not precedent decisions. Moreover, as counsel stresses, other evidence can be considered as establishing an alien's influence in the field. Thus, counsel's ability to locate three decisions by this office that sustain appeals without relying on citations is not relevant to the facts in this matter.

As stated above, original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis.

Matter of New York State Dep't of Transp., 22 I&N Dec. at 221, n. 7. Thus, some evidence of influence, beyond the mere publication or presentation of results, is required.

On appeal, the petitioner submits a petition circulated at his presentation in November 2005 signed by attendees affirming that they are "familiar with [the petitioner's] presentation and believe it had some degree of influence" on them. It can be argued, however, that most research, in order to be accepted for publication or presentation, must present some benefit to the general pool of scientific knowledge. This petition is not evidence that the signatories have subsequently applied the petitioner's work. Far more persuasive would be licensing contracts or other objective evidence that the petitioner's model is widely used. Regardless, the petition references a presentation that postdates the filing of the petitioner's immigrant visa petition.

Counsel asserts that most of the petitioner's articles are in Chinese and not amenable to evidence of citations. First, the unavailability of evidence creates a presumption of ineligibility. It is the petitioner's burden to prove that China has no citation indices or other means of determining the citation history of a given article. As stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534; *Matter of Laureano,* 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506. Moreover, the references all claim that the petitioner's influential work was performed in the laboratories of Dr. [redacted] and Dr. [redacted] Thus, the petitioner must corroborate these claims with evidence that his work in these laboratories has been published and applied in the field.

In addition to asserting that we should consider the post-filing citations, counsel further asserts that we should consider one of the self-citations because the citing coauthor, Dr. [redacted] was not the first author of the article cited. On appeal, Dr. [redacted] asserts that he did not cite the paper "out of a sense of aggrandizement." Self-citation is a normal and expected process when building upon one's own work or upon the work of one's subordinates; we presume no ulterior motive. A citation by a coauthor, however, simply cannot establish the petitioner's influence beyond his collaborators.

Regardless, even if we considered all of the citations in the record, they are minimal. No one article has been cited more than twice. The petitioner has not established that Parkinson's disease is such a limited area of research that two citations is remarkable.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working on a widespread disease such as Parkinson's inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to

grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.